IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

CONNIE REESE,	:	DOCKET NO.15 – 1,7766
Plaintiff / Appellee,	:	CIVIL ACTION – LAW
vs.	:	
	:	**11769 MDA 2016**
PAMELA TYLER,	:	
Defendant / Appellant	:	APPEAL / 1925 (a)

O P I N I O N A N D O R D E R
Issued Pursuant to Pennsylvania Rule of Appellate Procedure 1925(a)

This Court issues the following Opinion and Order pursuant to P.R.A.P. 1925(a). This is an appeal of a non-jury verdict entered on October 14, 2016, following a denial of post-trial motions entered on October 25, 2017. On November 3, 2016, Appellant/Plaintiff, Connie Reese ("Mother") filed her Concise Statement of Matters Complained of on Appeal ("Concise Statement"). In her Concise Statement, Ms. Reese asserted the following errors.

1. The Court erred by failing to consider the student loan as an installment or periodic payment after May 7, 2009, and each was a separate and distinct cause of action until the plaintiff took out a loan to pay off the student loan in May, 2011, making the plaintiff's breach of contract within the statute of limitations for contracts.

2. The Court erred by dismissing the plaintiff's cause of action for unjust enrichment as outside the statute of limitations.

This Court respectfully submits that it did not err in the application of the law and requests that the verdict be affirmed.

As to the first error complained of on appeal, this Court preliminarily notes that the argument has been waived. Mother plead and argued that the cause of action for the breach of the contract between Mother and her Daughter, Appellee, Pamela K. Tyler ("Daughter") was within the statute of limitations under the continuous contract doctrine. At trial, Mother additionally argued that the contract was not barred by the statute of limitations the doctrine of fraudulent concealment. At trial, the parties presented evidence in support and against those

theories. The Court addressed those arguments in its verdict, and Mother does not assign error there.

In a post-verdict motion for reconsideration, Mother for the first time raised the theory that the claim was not barred by the statute of limitations because the agreement was allegedly an installment contract. No party presented evidence at trial or argument on that issue. Theories not plead and presented at trial and by post-trial motion are waived. *See, e.g.,* Steiner v. Markel, 600 Pa. 515, 968 A.2d 1253 (Pa. 2009); Morgan v. Sbarbaro, 307 Pa. Super. 308 453 A.2d 598 (Pa. Super. 1982).

Even if the issue is not waived, the agreement between Mother and Daughter was an oral agreement that entailed mother co-signing a student loan for Daughter and Daughter promising to pay it. The oral agreement between Mother and Daughter was entirely separate from the student loan documents. Moreover, under the student loan documents, upon default of the student loan, the student loan became due in full. Indeed, the notice to Mother on December 23, 2009 was that Daughter had defaulted and if Mother failed to act the entire principal balance was due in full as of December 23, 2009 in the amount of $25, 342.88. (Defendant's Exhibit 5). Mother brought her cause of action for breach of contract on July 25, 2015, more than four years after Daughter's final payment(May 28, 2009), and more than four years after the final payment under the student loan became due (December 23, 2009).[1]

The Pennsylvania Supreme Court has observed that "a party asserting a cause of action is under a duty to use all reasonable diligence to be properly informed of the facts and

[1] In her motion to reconsider, Mother cited Leedom v. Spano, 436 Pa. Super. 18, 647 A.2d 221 (Pa. Super. 1994) to support her installment contract theory. Leedom involved a surety relationship governed by documents. In that case the Superior Court concluded that "the limitations period begins to run within a reasonable time after a material default has occurred." The Court also noted that the statute of limitations on a guarantee did not begin to run until loanholder elected to declare principal debtor in default and made demand upon the surety. In the present case, that clearly occurred in the notice of December 23, 2009.

circumstances upon which a potential right of recovery is based and to institute suit within the prescribed statutory period." Leedom v. Spano, 436 Pa. Super. 18, 647 A.2d 221 (Pa. Super. 1994), *citing*, Pocono Int'l Raceway Inc. v. Pocono Produce, Inc., 503 Pa. 80, 84, 468 A.2d 468, 471 (Pa. 1983). The Court respectfully submits that the statute of limitations barred the present cause of action on the contract between mother and Daughter. .

As to the second error, the Court notes that the unjust enrichment claim was dismissed because the parties had an oral agreement and therefore the cause of action was breach of contract and not unjust enrichment. "A cause of action for unjust enrichment arises only when a transaction is not subject to a written or express contract." Northeast Fence & Iron Works, Inc. v. Murphy Quigley Co., 2007 PA Super 287, 933 A.2d 664, 669 (Pa. Super. 2007)(citations omitted). However, even if there was no oral agreement, the cause of action for unjust enrichment was barred by the statute of limitations which is the same as limitation as that for breach of contract in this case. *See, e.g.,* Cole v. Lawrence, 701 A.2d 987 (Pa. Super. 1997); Sevast v. Kakouras, 915 A.2d 1147 (Pa. 2007).

For these reasons, and those provided in its Non-Jury Verdict and Order entered on October 14, 2016, this Court respectfully requests that the Verdict and Order be affirmed.

BY THE COURT,

December 23 , 2016
Date

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Richard A. Gray, J.

cc: Mary C. Kilgus, Esquire (for Appellant)
John P. Pietrovito, Esquire (for Appellee)
Prothonotary (LG)
Superior & 1